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09-833

No. _____

In The
Supreme Court of the United States

THOMAS P. LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA;
RONALD EDMONDS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District Court granted summary judgment against Petitioner taxpayer, but omitted a damage award in its judgment. Respondent failed to timely try to amend the judgment or appeal, so it tried to add damages later as the correction of a clerical error under Rule 60(a), by introducing an IRS certificate of assessment as new evidence. The District Court agreed to add damages under Rule 60(a). Petitioner filed a "Notice of Appeal and Conditional Appeal." Petitioner's appeal asked the Circuit Court to rule that a damage award could not be added under Rule 60(a) and that Respondent was stuck with a judgment that awarded it nothing. In the event that the Circuit Court ruled against Petitioner and held that a damage award could be added, then Petitioner's conditional appeal asked the Circuit Court to reverse the grant of summary judgment. The Circuit Court did not address the appeal. Instead, the Circuit Court skipped the appeal and ruled in favor of Petitioner on his conditional appeal.

Petitioner now asks the Supreme Court to rule on the following four questions:

(1) If an appellant files an appeal regarding Issue #1 and a conditional appeal regarding Issue #2, asking the circuit court to address Issue #2 only if the circuit court first rules adversely on Issue #1, is the circuit court permitted to skip Issue #1 and address only Issue #2? (Petitioner thinks that the answer is no.)

(2) Can a judgment constitute a final decision when it omits a damage award but otherwise clearly

indicates the district court's intent to be a final decision? (Petitioner thinks that the answer is yes.)

(3) When a judgment omits a damage award, can the prevailing party file a Rule 60(a) motion to add damages and introduce new evidence? (Petitioner thinks that the answer is no.)

(4) For purposes of establishing damages under Rule 60(a) in a contested trust fund penalty case, is a certificate of assessment sufficient for the IRS to prove damages? (Petitioner thinks that the answer is no.)

LIST OF PARTIES

Petitioner is Thomas P. Lewis. Respondent is the United States. Ronald Edmonds is a Respondent whose interests are aligned with Petitioner in this Petition.

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OPINIONS BELOW

1. On 9/12/05, the district court filed its opinion granting summary judgment against both Petitioners in a trust fund penalty tax case. This opinion did not include any finding of fact about the amount of damages.

2. On 9/13/05, the district court filed its Judgment granting summary judgment against both Petitioners. This Judgment did not include any damage award.

3. On 2/5/07, the Sixth Circuit ordered a limited remand of the case to the District Court to determine damages and address whether it was too late to add a damage award.

4. On 4/17/07, the Magistrate filed his Report and Recommendation ("R&R"), recommending the granting of the United States' Rule 60(a) motion to add a damage award as the correction of a clerical error.

5. On 4/23/08, the District Court approved the R&R and filed an Order holding Lewis and Edmonds liable for damages in the amounts of $5,641,612.09 and $6,036,829.23, respectively, plus interest since 2/26/07. The Court also vacated a prior ruling that Rule 60(a) could not be used to add a damage award.

6. On 5/28/08, the District Court filed an Amended Judgment that included a damage award against Petitioner.

7. On July 13, 2009, the Sixth Circuit unanimously reversed the summary judgment, but never addressed the finality issues.

BASIS OF JURISDICTION

This action originated in the United States District Court for the Western District of Tennessee. The District Court granted summary judgment in favor of Respondent on 9/13/05. That first Judgment failed to include any damage award. On 5/28/08, the District Court filed an Amended Judgment permitting the Respondent to add a damage award as a Rule 60(a) correction of a clerical error.

On 6/10/08, Petitioner filed an Amended Notice of Appeal and Conditional Appeal, in which he asked the Circuit Court to first rule that the District Court lacked jurisdiction to add a damage award and that Respondent was stuck with the 9/13/05 Judgment that awarded it nothing (the appeal). If and only if the Circuit Court ruled against Petitioner on the appeal, Petitioner asked the Circuit Court to reverse the grant of summary judgment (the conditional appeal). On 7/13/09, the Sixth Circuit ruled in favor of Petitioner on the conditional appeal (reversing the District Court's grant of summary judgment against Petitioner) but never addressed the appeal. Even though this decision was pro-Petitioner, Petitioner asked the Sixth Circuit for a rehearing to address its appeal. On 9/22/09, the Sixth Circuit denied Petitioner's Petition for a Rehearing.

The Supreme Court has jurisdiction to review the 7/13/09 decision by the Sixth Circuit Court of Appeals under 28 U.S.C. §1254. This Petition is timely filed because Supreme Court Rule 13(3) permits Petitioner to file his Petition for Writ of Certiorari within 90 days after the Sixth Circuit's 9/22/09 denial of the petition for rehearing.

RELEVANT STATUTES AND RULES

1. 28 U.S.C. §1291: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

2. F.R.A.P. 3(a) provides that "An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4."

3. F.R.A.P. 3(c)(1)(B) provides that "The notice of appeal must . . . designate the judgment, order, or part thereof being appealed."

4. F.R.C.P. 60(a) provides that "The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record."

STATEMENT OF THE CASE

This case began as a trust fund penalty tax case with some unique features, but it has evolved into a vitally important multi-faceted civil procedure case worthy of attention at the highest level. The critical facts are as follows:

1. Petitioner Tom Lewis ("Lewis") was CEO of a public company, VisionAmerica, Inc. ("VisionAmerica"). Ron Edmonds ("Edmonds") was CFO of VisionAmerica. VisionAmerica failed to remit certain trust fund taxes, so the IRS assessed the trust

fund penalty tax against both Lewis and Edmonds. Both taxpayers vigorously contested the liability and continue to do so.

2. Petitioner Lewis made a trust fund penalty payment of $2,711.16 and filed a claim for refund. The IRS rejected the claim. Lewis, a resident of Memphis, Tennessee, filed a complaint in the Western District of Tennessee, suing for a refund. Jurisdiction was under 28 U.S.C. §1346(a)(1). Venue was under 28 U.S.C. §1391(e). The United States counterclaimed for the entire trust fund penalty tax and added Edmonds as a third-party defendant.

3. All parties moved for summary judgment. When the United States filed its motion for summary judgment, its *Statement of Undisputed Facts* did not offer any evidence substantiating the specific amounts of money allegedly due and owing.

4. On 9/12/05, the District Court issued its "ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING CASE." (emphasis added) This was a 32-page opinion that purported to address all of the law and all of the facts. It held that both Lewis and Edmonds were responsible persons and that both had willfully failed to remit trust fund taxes to the Government. Its conclusion was crystal clear:

> "Based on the foregoing, the motion of the United States for summary judgment is GRANTED and the cross-motion of the Plaintiff is DENIED. Consequently, all remaining

pending motions in this matter are DENIED as moot and the pretrial conference and trial are to be removed from the Court calendar. The Clerk is hereby directed to enter judgment for the United States."

5. On 9/13/05, the Judge filed his Judgment in a Civil Case:

"**DECISION BY COURT.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that in accordance with the order Granting Motion For Summary Judgment Of The United States, Denying Plaintiff's Motion For Summary Judgment And Dismissing Case entered on September 12, 2005, this cause is hereby dismissed and judgment is entered for the Defendant, the United States Of America, and against the Plaintiff, Thomas P. Lewis and against the Third-Party Defendant, Ronald L. Edmonds."

6. Consistent with the Government's failure to provide sufficient evidence or even allegations in its *Statement of Undisputed Facts*, neither the 9/12/05 Order nor the 9/13/05 Judgment included any award of damages, or any finding of fact that would permit the calculation of the trust fund taxes owed, or even the date of assessment permitting the calculation of interest that accrued on the trust fund tax liability. In other words, the taxpayers lost but owed nothing.

7. On 9/22/05, Petitioner Lewis timely filed a Rule 59(e) motion for reconsideration, which the District Court rejected on 4/7/06.

8. Petitioner Lewis timely filed an appeal to the Sixth Circuit on 4/17/06. The United States did not file an appeal.

9. On 10/17/05, while the Petitioner's Motion for Reconsideration was pending and 34 days after the District Court's Judgment was filed, the United States filed an application to recover costs as a prevailing party. A hearing on this issue was conducted on 11/10/05 and the Clerk allowed costs to be assessed against the taxpayers. Lewis filed a Motion to Review Costs, asking the Court to reverse the taxation of costs. The District Court denied this Motion on 4/7/06.

10. On 12/19/05, also while Petitioner's Motion for Reconsideration was pending and 97 days after the District Court's Judgment was filed, the United States filed a motion to correct a clerical error. This motion acknowledged that the 9/13/05 Judgment did not include an award of damages and asked the Court to correct this "clerical error" by quantifying the damages. On 4/3/06, the Court denied the motion on the grounds that calculating damages is not a clerical chore.

11. After the 9/13/05 Judgment, the Government did not file a Rule 52(b) motion to add facts regarding the amount of damages. The Government did not file a Rule 59(e) motion to alter or amend the Judgment to add a damage award. The Government did not file a notice of appeal.

12. Again, on 4/3/06, the District Court denied Respondent's motion to add damages on the grounds that calculating damages is not a clerical chore, and on 4/7/06, the District Court denied Petitioner's motion to reconsider.

13. On 4/14/06, Petitioner filed a notice of appeal.

14. On 10/12/06, thirteen months after the District Court's dismissal of the case and six months after the taxpayers had filed their appeals, the United States filed a motion to dismiss the appeal on the jurisdictional ground that the District Court's judgment of dismissal was not an appealable final decision because the Judgment did not include an award of damages. Petitioner filed his brief opposing the motion.

15. On 2/5/07, the Sixth Circuit expressly did not rule on the finality issue, but remanded the case to the District Court to determine damages and address the finality issue:

> "Whether these appeals are premature will depend on whether the judgment entered for the government on September 13, 2005, was final for purposes of appeal. We are not inclined to rule on this issue until such time as the district court has determined the amounts claimed to be owed to the United States. Therefore, a limited remand is warranted. We express no opinion on the finality of the September 13 judgment and leave that issue to be considered, in the first instance, by the district court. If any party objects to the district

court's ruling on remand, a timely notice of appeal can be filed and the finality issue can be renewed in that party's briefing on the merits.

The motion to dismiss is DENIED without prejudice as set forth herein. This matter is remanded to the district court for the limited purpose of determining the amounts claimed to be owed to the United States. It is further ORDERED that any appeal taken from that determination be consolidated for briefing and submission with the present appeals. The district court is requested to forward a copy of its ruling to this court as part of the supplemental record on appeal."

16. On 2/28/07, the United States filed a Motion for Judgment in a Sum Certain, seeking to add a damage award against the taxpayers. The United States introduced new evidence to support its calculation of damages – a certificate of assessment showing what amounts the IRS had formally recorded as owed by the taxpayers. The motion was referred to a Magistrate for a report and recommendation. The motion did not indicate under what rule it was made. Nor did it address the finality issue.

17. On 4/17/07, the Magistrate filed his Report and Recommendation ("R&R"), treating the United States' Motion as a Rule 60(a) motion to correct a clerical error, and recommending that the motion be granted.

18. On 4/30/07, Petitioner Lewis filed his Objections to the R&R. The United States did not file any objections to the R&R, thereby accepting all of its

rulings, including the ruling that the United States' motion was a Rule 60(a) motion to correct a clerical error.

19. On 4/23/08, the District Court approved the R&R and filed an Order holding Lewis and Edmonds liable for damages in the amounts of $5,641,612.09 and $6,036,829.23, respectively, plus interest since 2/26/07. The Court also vacated its 4/3/06 ruling that Rule 60(a) could not be used to add a damage award.

20. On 5/28/08, the District Court filed an Amended Judgment that included a damage award against Petitioner.

21. Petitioner Lewis' first goal was to appeal the District Court's awarding of damages under Rule 60(a). If Lewis prevailed on this issue, then the Government would have won a judgment that awarded it nothing. Lewis would owe zero and there would be no trial or further activity of any kind. In the event Lewis' civil procedure argument failed, Lewis wanted a trial on the trust fund penalty tax issue. Thus, Lewis' second goal, contingent upon failure to achieve his first goal, was to appeal the District Court's grant of summary judgment.

Accordingly, on 6/10/08 Petitioner Lewis filed a "Notice of Appeal and Conditional Appeal" which stated the following:

> "1. Plaintiff Lewis appeals the Court's April 23, 2008 order that the Court's September 13, 2005 judgment be altered or amended under Rule 60(a) of the Federal Rules of Civil Procedure to add a

> damage award owed to the United States. Plaintiff disputes that the absence of a damage award in this case is correctable as a clerical error under Rule 60(a). Plaintiff Lewis also appeals the Amended Judgment in a Civil Case filed on May 28, 2008.
>
> 2. In the event the Sixth Circuit does not reverse or remand the Court's April 23, 2008 order and May 28, 2008 Amended Judgment as described above, Plaintiff Lewis conditionally appeals the Court's September 13, 2005 final judgment in favor of the United States holding him liable for the trust fund penalty tax."

Lewis' clearly-stated intention was to try to prevail on the civil procedure question, and if so, be done. Lewis asked the Court to review the trust fund penalty issues only if the Court first ruled against Lewis on the civil procedure question.

22. On 6/20/08, shortly after filing the Notice of Appeal and Conditional Appeal, Lewis filed a "Civil Appeal Statement of Parties and Issues," in which he again expressly distinguished between his appeal and his conditional appeal, in language virtually identical to his Notice of Appeal and Conditional Appeal.

23. Multiple briefs were filed by all parties. All parties understood that the civil procedure question was critical and all parties wrote extensively on the civil procedure issue. In fact, significantly more was written about the civil procedure question than the trust fund penalty issue.

24. At oral argument on June 17, 2009, all parties were prepared to address, and did address, the civil procedure issue. Counsel for Lewis devoted 100% of his time to the civil procedure question, discussing the conditional appeal issues only in response to questions from the Court. Similarly, the other lawyers devoted most of their time to the civil procedure question.

25. During oral argument, the Court asked whether it could avoid the civil procedure question by reversing the summary judgment and remanding the case back for trial. Such a reversal and remand would void the flawed judgment that omitted the damage award.

26. Petitioner Lewis responded by alerting the Court to the fact that his Notice of Appeal and Conditional Appeal had expressly bifurcated the appeal from the conditional appeal and that Lewis' intent was to not permit the Court to address the trust fund penalty issue unless the Court first ruled against Lewis on the civil procedure issue.

27. On July 13, 2009, the Court unanimously reversed the summary judgment. The Court never addressed the civil procedure issue, but explained in detail why the grant of summary judgment was in error. In other words, the Court resolved the conditional appeal without first resolving the appeal.

28. Actually the Court's Decision did refer to the civil procedure issue very briefly. In a nine-page decision, the Court noted in one phrase that the District Court "implicitly recognized that its September 12 judgment was not final by directing a

magistrate to conduct a hearing on the proper amount of damages." The Court then cited *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988), and *United States v. Reid*, 357 F.3d 574, 580 (6th Cir. 2004).

It is not clear whether the Court was intending to rule that the 9/13/05 Judgment was not a final decision. The Court never used language indicating that it was making a ruling. And it never addressed certain arguments made by Petitioner, strongly suggesting that the Court was not intending to rule on the civil procedure issues.

Furthermore, whether or not the 9/13/05 Judgment was a final decision depends upon the District Judge's discernible intent at the time of his 9/13/05 Judgment, not his second thoughts seven months later. Finally, *Christianson* and *Reid* permitted district courts to go back and correct prior non-final orders, not prior final decisions. Thus, neither case permits the District Court to go back and correct the 9/13/05 Judgment.

29. Though Lewis agreed that reversal of the summary judgment was a proper resolution of the conditional appeal, Lewis petitioned the Sixth Circuit for a rehearing to address his appeal first. In that petition, Lewis explained why he thought the Sixth Circuit was required to address his appeal before addressing his conditional appeal. Lewis' hope was that the Sixth Circuit would agree that the 9/13/05 was a final decision – that Petitioner lost but owed nothing – and that the case was over forever.

30. On 9/22/09, the Sixth Circuit denied Lewis's Petition for Rehearing.

REASONS FOR GRANTING THE PETITION

I Granting the Petition will enable the Court to (1) affect every case by instructing every appellant how it can frame its appeal by combining an appeal and a conditional appeal, (2) establish certain implications of the party presentation principle, a concept of increasing interest to the Court, (3) permit appellants the right to file protective appeals, and (4) restrain lower courts from exceeding their legal authority.

A. There is no case law directly on point.

Petitioner has not found any case that addresses the question whether an appellant can combine an appeal with a conditional appeal, requiring the circuit court to resolve one issue before looking at another issue.

B. There is closely-related case law – including recent Supreme Court decisions – that supports Petitioner.

1. The circuit court is not permitted to consider an issue not presented by the appellant.

The appellant controls the subject matter of the appeal and the circuit court lacks jurisdiction to address more than what the appellant designates. The statute creating appellate jurisdiction provides that "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. §1291. The jurisdiction

of the court of appeals is literally over "appeals," not over the final decisions.

The Court's jurisdiction over an appeal is based upon the timely filing of a notice of appeal. F.R.A.P. 3(a)(1). This requirement is jurisdictional. F.R.A.P. 3(c)(1)(B) requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." Thus, an appellant can narrow the scope of appeal by specifying exactly what he is appealing - and the court of appeals must honor the designation.

In *Elfman Motors, Inc. v. Chrysler Corporation*, 567 F.2d 1252 (3d Cir. 1977), the Third Circuit cited multiple cases standing for the proposition that the appellant controls the subject matter of the appeal and that the appeals court lacks jurisdiction to address more than what the appellant intended:

> "When an appeal is take from a specified judgment only or from a part of a specified judgment, the court of appeals acquires thereby no jurisdiction to review other judgments or portions thereof not so specified or otherwise fairly to be inferred from the notice as intended to be presented for review on the appeal." (567 F.2d at 1254)

The issue is the appellant's intent as discernible in the notice of appeal. Similarly, in *C.A. May Marine Supply Company v. Brunswick Corporation*, 649 F.2d 1049 (5th Cir. 1981), the Fifth Circuit approved the language in *Elfman* and held that the circuit court lacked jurisdiction to address issues beyond what the appellant had designated in its notice of appeal.

In *Drayton v. Jiffee Chemical Corporation*, 591 F.2d 352 (6th Cir. 1978), the plaintiffs were awarded damages for multiple losses, but not for all claimed losses. The plaintiffs' notice of appeal designated certain losses for appeal, but not all losses. The Sixth Circuit held that it lacked jurisdiction over all the losses not mentioned in the notice of appeal.

In *Beasley v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 751 F.2d 384 (6th Cir. 1984) [not recommended for full-text publication], the plaintiff filed two claims in his complaint. The trial court granted the defendant summary judgment on claim one. After a bench trial, the trial court ruled for the defendant on claim two. The plaintiff's notice of appeal mentioned only the second ruling. The Sixth Circuit held that the plaintiff's notice of appeal indicated an intent to appeal only claim two, so the court lacked jurisdiction over claim one.

In *Jordan v. Young*, 791 F.2d 933 (6th Cir. 1986) [not recommended for full-text publication], a prisoner filed two claims in a complaint against the warden. The warden's notice of appeal referred to only one issue, so the Sixth Circuit limited its review to that issue only.

In *United States v. Glover*, 242 F.3d 333 (6th Cir. 2001), the Sixth Circuit confirmed that "In Rule 3(c), Congress has limited this Court's appellate review to issues designated in the notice of appeal." (242 F.2d at 335) The Sixth Circuit observed that under Rule 3(c)(1)(B), "the decision what to appeal is left almost exclusively to the discretion of the appellant." (242 F.2d at 336-337)

The point of all these cases is that when an appellant clearly intends to limit the scope of appellate review, the court of appeals must honor that limitation. Petitioner clearly intended that the Sixth Circuit not look at his conditional appeal until it considered and ruled against him on his appeal.

2. The circuit court cannot improve an appellee's position without a cross-appeal by the appellee.

The "cross-appeal rule" provides that when an appellant appeals a judgment, the circuit court cannot worsen his judgment unless the appellee files a cross-appeal asking the court to worsen the judgment. The question that the Supreme Court has never definitively answered is whether the cross-appeal rule is a jurisdictional requirement (which would not be subject to exceptions) or is a rule of practice (which might be subject to exceptions on a case by case basis).

This issue is hot. In 1999 and again in 2008, the Supreme Court expressly did not answer the question. The Court ruled that even if the cross-appeal requirement is only a rule of practice, there are very few occasions where an exception would be permitted.

In *El Paso Natural Gas Company v. Neztsosie*, 526 U.S. 473 (1999), the defendants filed an appeal in a civil case. Though the plaintiff did not file an appeal, the Ninth Circuit took the initiative to make the prior judgment more favorable to the plaintiff. A unanimous Supreme Court reversed, holding that the circuit court was not permitted to improve the plaintiff's position when the plaintiff had not appealed. The Court expressly noted that it was not deciding whether the

cross-appeal rule was jurisdictional or simply a rule of practice. The Court held that even if it was only a rule of practice subject to exception, there was no compelling reason to make an exception.

Interestingly, the Government supported the defendants and argued that the cross-appeal rule was jurisdictional, so that the circuit court lacked the power to improve the plaintiff's result.

In *Greenlaw v. United States*, 128 S. Ct. 2559 (2008), a convicted criminal appealed his sentence as too long. The Government did not appeal, but there were clear sentencing guidelines and the sentence was actually and objectively too short. The trial court had made a clear error in favor of the defendant. Even though the Government did not appeal, the Eighth Circuit corrected the error and increased the sentence. The Supreme Court reversed, holding that the circuit court was not permitted to increase the sentence because the Government had not cross-appealed.

The Supreme Court acknowledged that it was not answering the question whether the cross-appeal rule was jurisdictional or just a rule of practice. It did not matter. The Supreme Court observed that it had never permitted an exception, and that the correction of a clear error was not enough to permit an exception.

Interestingly, in *Greenlaw*, the Government did not support the Eighth Circuit's decision in front of the Supreme Court. The Government's position was that the Eighth Circuit lacked jurisdiction.

As the Supreme Court observed in *Greenlaw*, multiple circuits have held that the cross-appeal rule

is jurisdictional, and multiple circuit courts have ruled that the cross-appeal rule is not jurisdictional, just a rule of practice.

The relevance of all this is that circuit courts are permitted to address only what appellants ask them to address in their notices of appeal. In effect, appellants instruct the court what to rule on, and the court is required to honor that instruction. This is the "party presentation principle."

In *Greenlaw*, the Supreme Court explained:

> "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to the courts the role of neutral arbiter of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant's rights. [case cited]. But as a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." [case cited]. As cogently explained:
>
> > "[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost

> always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us. [case cited].""

One logical implication of the party presentation principle is that an appellant ought to be able to combine a conditional appeal with an appeal and thereby require the circuit court to address the appeal first and perhaps only.

3. Petitioner's concept of a conditional appeal is the same as the long-approved concept of a protective appeal.

In *Anderson v. Roberson*, 2004 U.S. App. LEXIS 1817 (6th Cir. 2004) [not recommended for full-text publication], the Sixth Circuit discussed and approved the concept of a "protective cross-appeal," which is a form of conditional appeal.

> ""In a protective cross-appeal, a party who is generally pleased with the judgment and would have otherwise declined to appeal, will cross-appeal to insure that any errors against his interests are reviewed so that if the main appeal results in modification of the judgment his grievances will be determined as well." [citation omitted] . . . . Appellate courts generally allow protective cross-appeals but do not consider them unless it is appropriate to do so after disposition of the appeal. [citation omitted]

> Upon review, we conclude that we need not address the defendants' protective cross-appeal because the plaintiffs' appeal has been dismissed. The defendants' protective cross-appeal was dependent upon the plaintiffs' appeal such that the dismissal of the plaintiffs' appeal warrants dismissal of the defendants' cross-appeal."

As the Sixth Circuit explained, when the main appeal is resolved in favor of the cross-appellant, then the Sixth Circuit does not look at the protective cross-appeal. Accordingly, the Sixth Circuit would not address the cross-appeal first. Similarly, in Lewis' case, the Sixth Circuit should not have addressed the conditional appeal first. It should have first addressed the appeal, and if it resolved the appeal in favor of the taxpayers, it should have stopped and not have addressed the cross-appeal.

Note that if the district court had ruled against the United States on its motion to add a damage award, and if the United States had then appealed that decision, Lewis would have filed a protective appeal. That is, Lewis would have appealed the summary judgment only if the Sixth Circuit ruled against him on the final judgment issue, and the Sixth Circuit would have considered the final judgment issue first, and would have stopped if it resolved the final judgment issue in favor of Lewis. Why should the result be different when Lewis loses at the district court level and takes the initiative to appeal? There is no logical reason to disfavor Lewis under such circumstances, and no equitable reason.

C. The concept of a conditional appeal is fair.

If Lewis is not permitted to file an appeal and a conditional appeal, then he would have faced a dilemma: if he wished to guarantee that his appeal would be heard, then he would have had to have given up his conditional appeal and gamble entirely on the appeal. There is no good reason why Lewis, or any appellant, should have to make this choice. There is no good reason why the appellate process should insist upon dice-rolling gamesmanship.

If anything, in *Greenlaw*, the Supreme Court tried to reduce gamesmanship. One of the reasons justifying the cross-appeal rule is that when an appellant is deciding whether to appeal, he should not have to worry that an appellate court will worsen his position as a result of his appeal; he should only have to worry about what the government puts him on notice about in its cross-appeal.

D. The party presentation principle restricts the lower courts' authority to overreach and correct wrongs that they are not asked to correct.

Respondent made an error in this case that entitles the taxpayers to walk away without paying a penny. Even though Petitioner should owe zero anyway, this result could be perceived as an unjust windfall for the taxpayers. It is quite possible that the District Court and the Circuit Court were reluctant to permit such a windfall. Such an impulse is understandable but not permissible.

Respondent, the wealthiest and most powerful litigant in history, is fully capable of promoting its own

interests. Just as the circuit court should not have stepped in to sweeten the appellee's position in *Neztsosie*, and just as the circuit court should not have stepped in to improve the appellee's position in *Greenlaw*, and just as Justices Scalia and Thomas were concerned that the district court should not have stepped in to recharacterize a party's motion in *Castro v. United States*, 540 U.S. 374 (2003), and just as Justice Ginsburg wondered whether the district court should not have stepped in to apportion environmental liabilities when the parties were not proposing any sort of apportionment in *Burlington N. & Santa Fe Ry. Co.*, 129 S. Ct. 1870 (2009), it was not up to the courts to step in and protect Respondent from its own mistake.

II Granting the Petition will affect every case because it will provide much needed clarification of the definition of a final decision.

A. This is a hugely important question affecting every case.

A motion to add facts to a judgment must be made within 28 days after entry of a judgment. F.R.C.P. Rule 52(b). A motion to alter or amend a judgment must be made within 28 days after entry of a judgment. F.R.C.P. Rule 59(e). A notice of appeal must be made within 30 days after a judgment is entered. F.R.A.P. Rule 4(a)(1). Circuit courts have jurisdiction over an appeal from a final decision. 28 U.S.C. §1291. The definition of "final decision" affects the profoundest jurisdictional issues.

B. The current state of the law is confused and uncertain.

Respondent argued that the 9/13/05 Judgment was not a final decision because it failed to include a damage award. That this argument is still being made in 2009 indicates that the definition of "final decision" is not clear.

The evolution of Supreme Court decisions and rule-making has created some confusion.

In *United States v. Hark*, 320 U.S. 531 (1944), an opinion was rendered on Date One and a formal judgment was filed on Date Two. The Supreme Court held that the final decision was the judgment filed on Date Two. Regarding a final decision,

> "No form of words and no peculiar formal act is necessary to evince its rendition or to mature the right of appeal. . . . Where, as here, a formal judgment is signed by the judge, this is prima facie the decision or judgment rather than a statement in an opinion or a docket entry. . . . The judge . . . entered a formal order of record. We are unwilling to assume that he deemed this an empty form . . ." 320 U.S. at 534-535.

According to the Supreme Court, the issue was what the judge intended, and the presumption is that the judge intended a final decision when he filed a formal judgment.

The landmark case is *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958), in which a taxpayer won a refund claim. The district court

granted the taxpayer summary judgment on Date One in an opinion that did not include complete damage information. On Date Two, the district court filed a formal judgment that included complete damage information. The Court held that Date Two was the date of the final decision.

Schaefer does not require that a final decision must include a damage award. If it had, the decision would have been much shorter. The Court could have simply said that the Date One opinion was legally insufficient because it omitted critical information. But it didn't. Rather, it approvingly referred to *Hark* and the fact that no form of words is necessary to constitute a final decision (356 U.S. at 232), and then very succinctly stated that "While an opinion may embody a final decision, the question whether it does so depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion." The Court expressly explained that the lack of a damage award is "strong evidence" of a lack of intent to be done, but it is not the only factor. That is why the Court did not stop its analysis based on the lack of a damage award. Rather, it noted that a formal judgment was filed on Date Two, and that the formal judgment is prima facie the final decision under *Hark*. 356 U.S. at 235. In addition, the Court went on to examine the actions of all concerned – the judge, the clerk, and each party – to determine that no one thought Date One was the final decision. 356 U.S. at 235-236.

Schaefer does include dicta, that, read out of context, suggest that the absence of a damage award means that a judgment cannot legally constitute a final decision. That is, the Court wrote that "it is obvious that a final judgment for money must, at least,

determine, or specify the means for determining, the amount." 356 U.S. at 233. It is clear from the context that the Court meant that a properly drafted final decision would include a damage award, but the Respondent in this case and other parties in other cases have relied upon this dicta to argue that a decision cannot be final if it lacks a damage award. See *Fiataruolo v. United States*, 8 F.3d 930 (2nd Cir. 1993); *McDermitt v. United States*, 954 F.2d 1245 (6th Cir. 1992). As the Second and Sixth Circuits held, these parties have misread *Schaefer*, whose precise holding is that a decision is clearly final when (i) it includes a damage award, (ii) it is embodied in a separate document that is signed by the judge as a formal judgment, and (iii) all relevant parties treated it as the final decision. The Court did not hold that any one of these factors were alone sufficient or necessary to determine the final decision. Rather, all of the factors reflect intent and all of the factors need to be examined and weighed.

Interestingly, the taxpayer in *Schaefer* argued that the Date One opinion was the final decision because the missing information had been admitted by the Government in its answer. In Petitioner's case, the Government made the same argument – that discovery produced enough information to provide the amount of damages. Petitioner denies this statement as a matter of fact, but more importantly, the Supreme Court rejected this argument legally:

> "This argument cannot be accepted under the facts here for the reason that Rule 79(a) expressly requires that the clerk's entry "shall show . . . the substance of [the] judgment of the court. . . ." Surely the amount of the judgment

> for money is a vital part of its substance. To hold that one must search the whole record to determine the amount, or the facts necessary to compute the amount, of a final judgment for money would be to ignore the quoted provision of Rule 79(a)." 356 U.S. at 234-235.

The Supreme Court in *Schaefer* also observed that "there is no statute or rule that specifies the essential elements of a final judgment." 356 U.S. at 233.

Five years later, Rule 58 was amended to require that "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." According to the Advisory Committee that drafted this amendment,

> "Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., 'the plaintiff's motion [for summary judgment] is granted,' see *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 229... (1958). Clerks on occasion have viewed these memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of a judgment was effective, starting the time running for post verdict motions and for the purpose of appeal ... The

> amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document distinct from any opinion or memorandum which provides the basis for entry of judgment."

Note that the Advisory Committee did not observe that the absence of all essential elements of a judgment prevents a judgment from being a final decision. Note further that the Advisory Committee stated that the separate document rule "eliminated these uncertainties." No matter what deficiencies might exist in the judgment, the filing of a separate document is prima facie evidence of the judge's intent to be done.

In *United States v. Indrelunas*, 411 U.S. 216 (1973), the Supreme Court confirmed that the purpose of the 1963 amendment to Rule 58 was to remove uncertainty when a final decision has been made. The Court went on to hold that the rule was to applied mechanically "to make certain when a judgment becomes effective." 411 U.S. at 220-221.

However, in *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978), the Court held that the separate document rule could be waived by the parties. Since the purpose of the separate document rule is to give the parties certainty about the date of judgment, the parties could waive the separate document rule when it is clear from their conduct that they accepted the same date of judgment as the date of the final decision. The parties would not be required to go back to the district court, get a signed judgment, and then start over with appeals. "The Federal Rules of Civil Procedure are to be "construed to secure the just, speedy, and

inexpensive determination of every action." 435 U.S. at 386-387.

So a separate judgment is not absolutely necessary, but when it exists is it conclusive? Apparently not, because the Supreme Court further explained in *Bankers Trust* that "Even if a separate judgment is filed, the courts of appeals must still determine whether the district court intended the judgment to represent the final decision in the case." 435 U.S. at 385. In that case, the district court filed an opinion that expressly dismissed the plaintiff's case but did not file a separate judgment. The district court filed an opinion and order concluding "Complaint dismissed in its entirety. So ORDERED." On the same day, the clerk then made an entry to the same effect on the court's docket. The plaintiff appealed without objection and both parties proceeded as if the opinion was a final decision. The Supreme Court held that the district court clearly evidenced its intent to make a final decision and that the parties effectively waived the separate judgment rule.

Bankers Trust was superseded by the 2002 amendments to Rule 58 that provided that a judgment is deemed entered on the earlier of the date it is in fact entered on a separate document or 150 days after the date it is simply entered on the docket. Thus, an opinion that appears to be a final decision becomes a judgment 150 days after entry on the docket. The Advisory Committee on the 2002 amendments explained:

> "Rule 58 has provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule

> 79(a). This simple separate document requirement has been ignored in many cases. The result of failure to enter judgment on a separate document is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run. The time to appeal under Appellate Rule 4(a) also does not begin to run. There have been few visible problems with respect to Rule 50, 52, 54(d)(2)(B), 59, or 60 motions, but there have been many and horridly confused problems under Appellate Rule 4(a). These amendments are designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely, and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a)."

The circuit courts – including cases involving the trust fund penalty tax – have repeatedly held that a judgment that fails to provide for damages can still be a final decision, despite efforts to interpret *Schaefer* as requiring a damage award. *Fiataruolo v. United States*, 8 F.3d 930 (2nd Cir. 1993); *McDermitt v. United States*, 954 F.2d 1245 (6th Cir. 1992).

C. Petitioner's case presents the issue in clear terms.

In Petitioner's case, the objective indicia of the District Court's intent when it filed its 9/13/05 Judgment include the following:

(1) The Judgment expressly stated that the case was dismissed. Perhaps the single most compelling

evidence of intent is the presence or absence of a reference to dismissal.

(2) The 9/12/05 Order could not have been stronger. Not only did it expressly dismiss the case, it expressly deemed all pending motions as moot, it canceled the pre-trial conference, and it removed the trial from the court docket.

(3) Just like the case in *Fiataruolo*, the Judge wrote a comprehensive 32-page opinion addressing all arguments before him.

(4) Just like the case in *Fiataruolo*, the Court confirmed its initial decision months later when rejecting Lewis's Rule 59(e) motion to reconsider.

(5) The District Court Clerk understood the finality of the Judgment, as evidenced by the docketed case caption that warns in capitalized bold print:

"WARNING: CASE CLOSED on 09/12/2005."

(6) Respondent clearly understood the finality of the 9/13/05 Judgment when it applied for costs as the prevailing party just one month later. The Clerk clearly understood the finality of the 9/13/05 Judgment when it approved those costs to Respondent as the prevailing party. The Court clearly confirmed the finality of the 9/13/05 Judgment when it affirmed those costs to Respondent as the prevailing party.

(7) Respondent understood the finality of the 9/13/05 Judgment when, 97 days later, it filed a Rule 60(a) motion to correct a clerical error – a motion not

subject to the post-final decision deadlines of other remedial motions.

(8) The issue of finality was not raised by Respondent until more than one year after the 9/13/05 Judgment, after Lewis and Edmonds had already filed lengthy appellate briefs.

III Granting the Petition will enable the Court to clarify that the omission of a damage award is not a clerical error that can be corrected by making a Rule 60(a) motion and introducing new evidence.

A. The Question.

Rule 60(a) provides "The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." A Rule 60(a) motion is not subject to a timing deadline. The question is whether Rule 60(a) can be used when more evidence must be added to the record to correct a mistake.

Respondent argued that evidence outside the record could be considered in a Rule 60(a) motion if the fact being established is objectively certain and undeniable.

Petitioner's position is that a Rule 60(a) motion cannot rely on new evidence, that the correction of an error under Rule 60(a) is not about a new round of adjudication.

The Supreme Court has not ruled on this.

B. The circuit courts generally support Petitioner, but there is one Tenth Circuit decision that Respondent tried to rely upon that suggests that evidence outside the record can be used.

The Sixth Circuit has repeatedly held that a Rule 60(a) motion cannot be based on new evidence outside of the record. *In re Walter*, 282 F.3d 434 (6th Cir. 2002); *Olle v. The Henry & Wright Corporation*, 910 F.2d 357 (6th Cir. 1990); *Hirsch v. Commissioner*, 186 F.2d 524 (6th Cir. 1951).

In *Hirsch*, the taxpayer won a tax refund suit in district court. The Government filed a Rule 60(a) motion and filed a new exhibit – a certified transcript of account – showing that the taxpayer had not paid as much taxes as the taxpayer had claimed, thereby requiring a reduction in the refund amount. The District Court granted the motion but the Sixth Circuit reversed. Rule 60(a) was not available because "we are dealing with something other than clerical mistakes. We are confronted with the clear adjudication upon consideration of new evidence . . .." Regardless of how strong the new evidence was that a mistake had been made, Rule 60(a) was not appropriate.

The same result followed forty years later, in *Olle*. Though an error was clear and not disputed – based upon new evidence that had not been part of the record – the Sixth Circuit reaffirmed that the error was not a clerical error and could not be corrected by Rule 60(a).

Respondent argued, and the District Court agreed, that a Rule 60(a) motion could be based upon facts outside the record if the facts are readily ascertainable and undisputed. They relied upon *Semtner v. Group*

Health Service of Oklahoma, Inc., 129 F.3d 1390 (10th Cir. 1997). Respondent and the District Court misinterpreted *Semtner*, which at most held that a fact outside the record might be used in a Rule 60(a) motion if the parties agree that the fact is correct. Otherwise, the fact would require the judge to adjudicate new facts, and correcting clerical errors is not about adjudicating new facts.

IV Granting the Petition will enable the Court to clarify that the presumption of correctness generally accorded to IRS assessments (1) does not apply when the IRS has superior access to the relevant tax information, (2) is not sufficient to correct an error under Rule 60(a), and (3) is not sufficient to clothe an otherwise naked assessment.

A. The Question.

To prove damages for purposes of its Rule 60(a) motion, Respondent argued, and the District Court agreed, that the IRS's certificate of assessment was enough.

Petitioner's position is that the presumption of correctness is not always created by an IRS assessment, and that even when the presumption is created, its effect is to break a tie at trial, not to relieve the government of the need to establish a foundation for its tax claim.

The Supreme Court has not addressed these nuances.

B. The presumption of correctness should not apply when the IRS has more access and control over the relevant information than the taxpayer.

The presumption of correctness should not apply in Petitioner's case because the public policy underlying the presumption – as explained by the Third Circuit in *Psaty v. United States*, 442 F.2d 1154 (3rd Cir. 1971) – would not be served. The presumption of correctness is designed to place the burden of proof on the party who has access to and controls the relevant information – typically the taxpayer. But in this case, Lewis and Edmonds had no access or control over the information. The Government did. So the rule should not apply against Lewis and Edmonds.

C. The presumption of correctness should not be sufficient to justify a clerical correction under Rule 60(a).

It is a non-sequitur to use the presumption of correctness to establish a fact as certain enough to constitute a correction to a clerical error under Rule 60(a). The presumption of correctness breaks a tie at trial. Its purpose is to assign the burden of proof to the taxpayer at trial. The presumption in no way establishes a fact as so obvious and certain that a court can later characterize the failure to find the fact as clerical error in a post-trial 60(a) motion.

D. A certificate of assessment should not be sufficient to establish liability in a case where liability is disputed.

A certificate of assessment may be sufficient in collection cases where the taxpayer does not contest the amount of his liability, but that does not mean that a certificate of assessment is sufficient when the taxpayer does contest the fact and amount of liability.

A certificate of assessment is no more persuasive than if the IRS said "The taxpayers owe $X because we say they owe $X."

In *United States v. Janis*, 428 U.S. 433 (1976), the Supreme Court has already ruled that "naked assessments" without sufficient foundation are not entitled to any presumption of correctness. This was followed by the Sixth Circuit in *Coleman v. United States*, 704 F.2d 326 (6th Cir. 1983).

In Petitioner's case, the Government is relying upon an IRS print-out. Without evidence of the critical underlying facts, the print-out evidences nothing more than a naked assessment.

Respectfully submitted,

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